WARISAN ZAMRUD SDN BHD v. SAUNAH KASNI & ORS

HIGH COURT MALAYA, SHAH ALAM
LIM CHONG FONG JC
[CIVIL SUIT NO: 21-221-2009]
25 MAY 2015

LAND LAW: *Sale of land – Registrar of Land Titles – Breach of statutory duty – Negligence – Search certificate, issuance of – Private land searches – Failure to provide accurate land search results – Whether Registrar of Land Titles could be held liable for negligence – Whether compensation and damages of any error only available for official searches – National Land Code, ss. 384, 385 & 386*

PUBLIC AUTHORITIES: *Registrar of Land Titles – Breach of statutory duty – Negligence – Search certificate, issuance of – Private land searches – Failure to provide accurate land search results – Whether Registrar of Land Titles could be held liable for negligence – Whether compensation and damages of any error only available for official searches – National Land Code, ss. 384, 385 & 386*

The first defendant ('Saunah') was the registered owner of a double-storey detached house ('property') before the subsequent purchases of the property took place. The purchase of the property by Saunah in 2002 was financed by a loan facility granted by the fourth defendant ('Nova Scotia Bank'). As a security for the loan facility, Saunah executed a charge over the property which was registered as a first legal charge ('the charge'). When Saunah defaulted in the monthly payments under the loan facility Nova Scotia Bank initiated foreclosure proceedings against her. The High Court granted an order for sale by public auction to Nova Scotia Bank for the recovery of the sum of RM1,573,438.68. The third defendant ('Nurfara') was the successful bidder at the eighth public auction of the property. However, upon an application by Saunah, the High Court set aside the sale of the property that was auctioned. In the meantime, Saunah met the plaintiff ('Warisan') who was interested to purchase the property. Warisan subsequently relied on its private searches conducted on the property on 21 March 2008, 21 May 2008 and 29 May 2008 which yielded the same results, *to wit*, Saunah was the registered proprietor of the property and the charge of Nova Scotia Bank had been discharged on 26 February 2008. Therefore, Warisan embarked in purchasing the property from Saunah and executed the sale and purchase agreement on 18 June 2008. Consequently, Warisan lodged a private caveat on the property on 20 June 2008. However, the Court of Appeal subsequently set aside all the orders made by the High Court pursuant to an appeal by Nova Scotia Bank. On 17 February, Warisan conducted another private search on the property and discovered that Nurfara had lodged a private caveat on the property by virtue of the successful auction bid. It was only discovered by Warisan, from a further private search on 18 June 2009, that the charge was discharged and the property was instead transferred to the fifth defendant ('Ho Su Meng'). There was also a charge

presented by Malayan Banking Bhd that was concurrently registered. Accordingly, Warisan filed the present suit. Warisan had narrowed down its claim to that of negligence of the sixth defendant ('Pendaftar Hak Milik') in failing to ensure that the land search results obtained by the plaintiff were accurate. Nurfara counterclaimed againts Warisan contending that the private caveat lodged by Warisan on the property on 20 June 2008 was unlawful. The issue that arose for determination, *inter alia*, was whether the Pendaftar Hak Milik was negligent in providing inaccurate land search results.

Held (dismissing plaintiff's claim against sixth defendant; dismissing third defendant's counter claim against plaintiff):

(1) From the reading of ss. 384, 385 & 386 of the NLC, the responsibility and the liability assumed by the land registry are different in respect of the type of searches. Compensation is only attracted for loss or damage by reason of any error in or omission from the certificate of search that emanated from the official search. Thus by implication, there would be no compensation payable for any loss or damage suffered in reliance on the result of a private search. (para 56)

(2) The private search was meant for general information only. For purposes of the conduct and undertaking of land dealings, an official search has to be done. In this regard, the search results would be set out in a certificate of search issued under the hand and seal of the Registrar. From the evidence adduced, the searches done by the plaintiff were only private searches. Although the plaintiff had received the results in the form of a written printout from the Land Registrar rather than the plaintiff having to copy them manually from the register, these printouts *ipso facto* does not convert them into certificates of search arising from official searches. The search results that were tendered in court were clearly stipulated to have been made pursuant to s. 384 of the NLC. (paras 56 & 57)

(3) The policy of the statute negatived any duty of care that might be owed by the Land Registry in relation to private searches. This was the risk voluntarily assumed by the plaintiff for having conducted private searches instead of official searches. Accordingly, the plaintiff could not mount or sustain its action in negligence against the Land Registrar. (para 58)

Case(s) referred to:

Ambank (M) Bhd v. Abdul Aziz Hassan & Ors [2010] 7 CLJ 663 CA ***(refd)***
CIMB Bank Bhd v. Abdul Rafi Abdul Rajak & Ors [2013] 3 CLJ 397 HC ***(refd)***
Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors (No 2) [2001] 5 CLJ 8 HC ***(refd)***
Government of the State of Sabah v. Syarikat Raspand [2010] 7 CLJ 945 CA ***(refd)***
Jamaluddin Mohd Radzi & Ors v. Sivakumar Varatharaju Naidu; Suruhanjaya Pilihan Raya (Intervener) [2009] 4 CLJ 347 FC ***(refd)***
JHW Reels Sdn Bhd v. Syarikat Borcos Shipping Sdn Bhd [2013] 7 CLJ 249 HC ***(refd)***

Perwira Affin Bank Bhd v. Sardar Mohd Roshan Khan [2011] 5 CLJ 886 CA ***(refd)***
Poh Yang Hong v. Ng Lai Yin & Ors [2010] 8 CLJ 323 HC ***(refd)***
Poh Yang Hong v. Ng Lai Yin & Ors [2013] 8 CLJ 964 HC ***(refd)***
Rajamani a/p Meyappa Chettiar v. Eng Beng Development Sdn Bhd & 5 Ors [2015] 2 AMR 767 ***(refd)***
Soon Poy Yong v. Westport Properties Sdn Bhd & Ors [2014] 10 CLJ 686 HC ***(refd)***
Tirai Kristal Sdn Bhd lwn. Pengarah Tanah Dan Galian Wilayah Persekutuan Kuala Lumpur [2013] 6 CLJ 530 HC ***(refd)***
Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors [2012] 3 CLJ 271 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 73
Government Proceedings Act 1956, ss. 5, 6
National Land Code, ss. 241, 244, 253, 259, 340(2)(b), 384, 386

For the plaintiff - Selva Balan Sinnan (Susan Joseph with him); M/s Azman Joseph & Assocs
For the 3rd defendant - Muhamad Nazri Muhamad; M/s Muhamad Nazri & Partners
For the 4th defendant - Ramesh Sanghvi (Khairul Nadia with him); M/s Kassim Tadin, Wai & Co
For the 6th defendant - Kam Sani; FC

Reported by Sandra Gabriel

JUDGMENT

Lim Chong Fong JC:

Introduction

[1] This is the third in the series of Selangor land scam cases that came before me after *Soon Poy Yong v. Westport Properties Sdn Bhd & Ors* [2014] 10 CLJ 686 and *Rajamani a/p Meyappa Chettiar v. Eng Beng Development Sdn Bhd & 5 Ors* [2015] 2 AMR 767.

[2] There are two related actions here. Besides this case, there is also SAHC Civil Suit No. 22-NCVC-515-08-2013 between The Bank of Nova Scotia Bhd and Saunah binti Kasni & 3 Ors ("related suit"). By an earlier court order, both cases are to be tried by the same judge. They were tried one after the other. However, it was agreed that the judgments will be delivered simultaneously *albeit* separately because the evidence was received in both of them independently.

[3] The plaintiff in this case is a private limited company and purchaser of a double storey detached house held under H.S.(D) 107738 Lot 1828 Mukim Damansara, Daerah Petaling, Selangor carrying postal address 65, Jalan SS1/22, 47300 Petaling Jaya, Selangor ("property") from the first defendant.

[4] The first defendant is an individual and the registered owner of the property before the subsequent purchases of the property in issue in this suit took place.

[5] The second defendant is also an individual who lodged a private caveat on the property.

[6] The third defendant is an individual and trading in the name of Perniagaan Myzul who purchased the property in the court auction pursuant to the foreclosure of the charge over the property created by the first defendant in favour of the fourth defendant.

[7] The fourth defendant is a licensed bank who gave a loan facility to the first defendant that was secured by a charge over the property.

[8] The fifth defendant is an individual who purportedly also purchased the property from the first defendant. The fifth defendant is presently the registered proprietor of the property.

[9] The sixth defendant is the registrar of land titles of Selangor that is involved in land registration pursuant to the National Land Code 1965.

The Trial Process

[10] The trial of this action commenced before the trial of the related suit and consumed three days on 7, 8 and 28 May 2014. Prior thereto, the plaintiff has at the final pre-trial case management on 7 April 2014 withdrawn its claim against the first, second and fifth defendants. In other words, the trial proceeded against the third, fourth and sixth defendants only.

[11] The trial documents were bundles A, A1, B1 to B5, C, D, E, F, G, H and I including the documentary evidence in bundles B1 to B5 (except for several documents which were later specifically admitted as exhibits save for those in bundle B2 pp. 137 to 138 and B3 pp. 1133 to 1149, 1172 and 1208) which were agreed by the parties to be of status B. In the course of the trial, exhs. P1, P2, P3, P6, P7, D8, D9, D10, P12 and D13 were admitted in evidence. In addition, the following witnesses gave sworn testimony for the respective parties:

Plaintiff

(i) Manmohan Singh a/l Gurdev Singh (PW1), a director of the plaintiff;

Third Defendant

(ii) Shijatul Hazimah binti Mohd Yusoff (DW1), aunt of the third defendant and agent pursuant to a power of attorney dated 18 September 2008 of the third defendant;

Fourth Defendant

(i) Wong Chin Seong (DW2), manager of loan and administration of the fourth defendant bank; and

(ii) Hui Swee Har (DW3), senior collection officer of the fourth defendant bank;

Sixth Defendant

(i) Ahmad Sazali bin Selamat (DW5), registrar of land titles at the Selangor Land and Mines Office;

(ii) Nurul Ashikin binti Ahmad Isa (DW6), administrative officer at the Selangor Land and Mines Office;

(iii) Hani Inulfarah binti Mohd Isa (DW7), clerk at the Selangor Land and Mines Office.

[12] After the trial, the closing written submissions were deferred till the conclusion of the related suit. As thereafter directed, the parties then submitted their written closing submissions in chief and in reply. There was oral clarification with counsel on 1 April 2015 and the parties were further directed to file further written submissions on certain points.

Background Facts

[13] The first defendant purchased the property from a Shaheena binti Syed Jaafar in 2002. The purchase of the property was financed by a loan facility granted to the first defendant by the fourth defendant for RM1,460,000.

[14] As the security for the loan facility, the first defendant executed a charge over the property and the charge was registered on 7 November 2002 as a first legal charge in the Shah Alam land registry *vide* presentation No. 73366/02 ("charge").

[15] The first defendant defaulted in the payment of the agreed monthly payments under the aforesaid loan facility and the fourth defendant on 2 June 2003 initiated foreclosure proceedings against the first defendant *vide* KLHC Originating Summons No. S3-24-973-2003. The High Court granted an order for sale by public auction on 2 December 2004 to the fourth defendant for the recovery of the sum of RM1,573,438.68.

[16] On 13 April 2005, the fourth defendant's solicitors, Messrs Kassim Tadin Wai & Co deposited in the High Court the original issue document of title of the property described as hakmilik 100802HSD00107738 versi 2 dated 26 March 2003 ("IDT1") found in bundle B3 pp. 1212-1214 (exh. D10) and the duplicate charge.

[17] The public auction was postponed seven times because there were no bidders.

[18] On the eighth auction fixed on 5 March 2008, the property was sold to the third defendant being the successful bidder at the auction. The property was purchased by the third defendant on trust for her aunt, Shijatul Hazimah binti Mohd Yusoff.

[19] The first defendant on 21 March 2008 filed an application to set aside the auction sale and the High Court on 4 July 2008, *inter alia*, set aside the sale of the property that was auctioned on 5 March 2008.

[20] In the meanwhile, the first defendant on 12 March 2008 entered into a sale and purchase agreement of the property with a Ravindran a/l Kannan. However by a subsequent agreement between the first defendant and Ravindran a/l Kannan, the sale of the property was to be rescinded and substituted with a new sale and purchase agreement executed between the first defendant and a new purchaser on the condition that the Ravindran a/l Kannan is refunded his deposit payment of RM700,000.

[21] The first defendant subsequently met the plaintiff who was interested to purchase the property. She showed to the plaintiff the original issue document of title of the property described as hak milik 100802HSD00107738 versi 3 dated 5 March 2008 in her possession ("IDT2") found in bundle B3 pp. 1209 to 1211 (exh. P2). The plaintiff on 29 May 2008 conducted a private search on the property at the Shah Alam land registry. It was verified that the title was in the name of the first defendant free of encumbrances.

[22] Accordingly, the plaintiff and the first defendant executed the sale and purchase agreement on 18 June 2008 of the property ("sale and purchase agreement") at the price of RM840,000 payable in six months. The plaintiff conducted a further private search on the property on 20 June 2008 and the result was the same as that search earlier conducted on 29 March 2008. The plaintiff also lodged a private caveat on the property on 20 June 2008.

[23] The fourth defendant filed an appeal on 10 July 2008 and the Court of Appeal on 27 July 2009 set aside all the orders made by the High Court on 4 July 2008.

[24] In the meanwhile, the plaintiff again on 31 July 2008 conducted another private search on the property and discovered that the second defendant lodged a private caveat by reason of a friendly loan between the second defendant and the first defendant.

[25] The plaintiff met the first defendant and was requested by the first defendant to pay the balance purchase price of RM140,000 in advance so that the first defendant could cause the private caveat of the second defendant to be withdrawn, otherwise the first defendant would scout for a new purchaser to substitute the plaintiff and refund the plaintiff accordingly.

[26] The plaintiff made the balance payment and decided after several months having elapsed to proceed with the registration of the transfer of the property to the plaintiff. Hence, the plaintiff conducted another private search on the property on 17 February 2009 and discovered that the third defendant had lodged a private caveat on the property by virtue of its successful auction bid on 5 March 2008.

[27] The plaintiff conducted a further private search on the property on 18 June 2009 and discovered that the charge was discharged on 26 February 2008 and the property was instead already transferred to the fifth defendant on 24 March 2008.

[28] Accordingly, the plaintiff filed this suit on 13 August 2009.

Contentions Of The Plaintiff

[29] The plaintiff in its statement of claim sought, *inter alia*, for the following orders:

(i) a declaration that the plaintiff is a *bona fide* purchaser for value of the property;

(ii) a declaration that the charge in favour of the fourth defendant has been discharged;

(iii) that the sixth defendant do register the plaintiff as the registered proprietor of the property;

(iv) in the alternative, the first and/or the sixth defendant refund the sum of RM840,000 to the plaintiff; and

(v) aggravated and exemplary damages.

[30] In the plaintiff's closing written submission, the plaintiff submitted that after having gone through the trial, the plaintiff is of the opinion that the property is beyond the reach of the plaintiff because:

(i) the registered proprietor at the date of the execution of the sale and purchase agreement was the fifth defendant and not the first defendant; and

(ii) the third defendant was the successful bidder at the auction held on 5 March 2008.

[31] Since there were already two earlier transactions, the plaintiff reconsidered and submitted that it would be an act in futility to contest the ownership of the property and is therefore now confining itself to the claim against the sixth defendant in negligence. In other words, the plaintiff's claim against the third and fourth defendants is abandoned.

Contentions Of The Defendants

[32] The third and fourth defendant have in retort basically contended that the sale and purchase of the property as ordered by the court *vide* the public auction held on 5 March 2008 was lawful and binding. In the premises, the third defendant contended that the private caveat lodged by the plaintiff on the property on 20 June 2008 was unlawful and sought by way of counterclaim for compensation in damages as a result thereof because the subsistence of the caveat prevented the registration of the transfer of the title to the third defendant.

[33] As far as the sixth defendant is concerned, the plaintiff's allegations were put to strict proof. The sixth defendant stressed that the plaintiff's now confined claim to damages arising from erroneous search results was not adequately pleaded; see *Ambank (M) Bhd v. Abdul Aziz Hassan & Ors* [2010] 7 CLJ 663. The sixth defendant also argued that it had at all material times

duly carried out its administrative duties faithfully as provided in the National Land Code including registering the discharge of the fourth defendant's charge, transfer of the property from the first defendant to the fifth defendant and charge by the fifth defendant to Malayan Banking Berhad that were presented.

Besides, the sixth defendant contended that the plaintiff ought instead to have pursued the matter as an action *in personam* against the plaintiff only.

Finally the sixth defendant, just as in the two other earlier cases that came before me, also emphasised that the plaintiff's claim was procedurally defective due to non and misjoinder of parties; to wit the true tortfeasor had not been named.

Issues For Determination

[34] From the pleadings, list of agreed and non agreed issues and the closing arguments of the parties particularly that of the plaintiff that has now limited the scope of its claims, the issues for ultimate determination in this action may be reduced to as follows:

(i) validity of the third defendant's purchase of the property bought pursuant to the public auction held on 5 March 2008 and consequently its counterclaim against the plaintiff; and

(ii) negligence on the part of the sixth defendant in the provision of inaccurate land search results.

Findings Of The Court

Validity Of The Third Defendant's Purchase Of The Property

[35] From IDT1, it is indisputable that the first defendant was the registered proprietor of the property named therein and the loan that was provided by the fourth defendant to the first defendant was secured by a registered charge thereon. I was shown the original copy of IDT1 that was lodged in the High Court and am satisfied as to its authenticity.

[36] It is also not in dispute that the first defendant defaulted on the repayment of the loan and the fourth defendant on 2 December 2004 obtained from the High Court an order for sale of the property. In this regard, the third defendant was the successful bidder at the eight public auction of the property held on 5 March 2008.

[37] Since the third defendant's purchase of the property arose from a foreclosure action that was done pursuant to a registered charge in accordance with ss. 241 to 244 and sale conducted pursuant to ss. 253 to 259 of the National Land Code respectively and never challenged by the parties herein, I find and hold that the third defendant's purchase of the property was therefore lawful and valid.

[38] In this connection, there is just a further collateral issue that requires determination in that the fourth defendant's charge on the property was purportedly discharged on 26 February 2008, about a week before the public auction took place.

[39] The fourth defendant had vehemently contended that the discharge of the charge was procured through forgery as testified by DW1 and DW2. They lodged a police report on 26 February 2009 and 10 March 2009 respectively. I have no reason to disbelieve them. In addition, there was no rebuttal evidence to the contrary of the first defendant or the fifth defendant who supposedly benefited from the transaction. The solicitor who purportedly attested to her signature in the form of discharge of the charge is non-existent in the roll of advocates and solicitors as confirmed by the Bar Council Malaysia. I have taken further precautionary measures by invoking s. 73 of the Evidence Act 1950 by requiring DW2 to sign sample signatures before me for comparative purposes.

[40] On the totality of the evidence, I am satisfied and find that DW2 did not execute the discharge of the charge on the property in February 2008. In other words, her signature therein was forged. Accordingly the discharge is voidable pursuant to s. 340(2)(b) of the National Land Code which reads:

> 340. Registration to confer indefeasible title or interest, except in certain circumstances
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible -
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law ...

[41] In *CIMB Bank Bhd v. Abdul Rafi Abdul Rajak & Ors* [2013] 3 CLJ 397, Vernon Ong J (now JCA) also found the discharge of charge therein defeasible by virtue that the discharge was not executed by the plaintiff chargor.

[42] As sought by the fourth defendant who is the plaintiff in the related suit, I have also therein declared the discharge of the charge void for forgery. In other words, the discharge was of no effect.

[43] Consequently, I find and hold that the charge of the fourth defendant subsisted at all material times including at the public auction on 8 March 2008.

[44] The third defendant's title to the property has however still not yet been registered particularly in light of the private caveat lodged by the plaintiff on 20 June 2008 as alleged. That notwithstanding, I note that the title was also registered in the fifth defendant's name with a charge thereon by Malayan Banking Berhad who financed the fifth defendant's purchase of the property. The issue of competing titles and interest and priority thereto is strictly speaking not relevant here from the issues for determination in this action but is dealt with in the related suit.

[45] In the circumstances, I am not satisfied that the private caveat lodged by the plaintiff was the sole and dominant cause that prevented the registration of the transfer of the title of the property to the third defendant. Thus unless and until the issue of competing titles and interests are adjudged by the court, the transfer could not take effect. Accordingly, it is unfair to the plaintiff to have to bear the losses suffered by the third defendant as alleged. To my mind, the plaintiff had also lodged the caveat on the property in good faith to protect its commercial interests.

Negligence Of The Sixth Defendant

[46] The plaintiff has narrowed down its claim to that of negligence of the sixth defendant in failing to ensure that the land search results obtained by the plaintiff were accurate.

[47] In this regard, PW1 testified that the plaintiff substantially relied on its private searches conducted on the property on 21 March 2008, 21 May 2008 and 29 May 2008 before embarking to purchase the property from the first defendant and executing the sale and purchase agreement on 18 June 2008. In all the searches, they yielded the same results, to wit: the first defendant was the registered proprietor of the property and the charge of the fourth defendant had been discharged on 26 February 2008.

[48] It was only discovered by the plaintiff from the private search done on 18 June 2009 that the fifth defendant was registered as the registered proprietor by virtue of the transfer presented on 24 March 2008. There was also a charge presented by Malayan Banking Berhad that was concurrently registered.

[49] At the trial, DW5 of the sixth defendant answered as follows during cross examination:

Q : Transaksi pada 24.3.2008, berapa lama maklumat itu akan muncul dalam carian?

A : Bermula pada 24.3.2008 ia akan muncul serta-merta sebagai perserahan dan kepada siapa.

Q : Encik kata apa apa pendaftaran akan muncul serta-merta tetapi disini tak muncul? A

A : Tak pasti.

Q : Kalau tak muncul bermakna terdapat kecuaian?

A : Setuju. B

Even assuming that registration would not take effect immediately after presentation of the instrument of dealing by reason of heavy workload in the land registry, I have also questioned DW5 as to why the various presentations that were lodged were not stated in the searches under the item "Urusan-urusan dalam Perserahan yang belum didaftarkan" but he could also C not explain the reason to me. It seems to me that this searchable item must plainly have been intended to bridge the timing gap between the presentation and registration of the dealing and inform the public accordingly when searches are made. The land registry must therefore immediately enter the data into that item in the system on the receipt of presentation of an D instrument of dealing and to thereafter delete it when that dealing has been duly registered. Failure to do so in my view is gross negligence.

[50] In *Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors* [2012] 3 CLJ 271, Prasad Sandosham Abraham J (now JCA) held as follows at p. 290: E

[26] *The maintenance of a land registry that is efficient and maintains accurate particulars is a duty that the 1st defendant owes to every member of the public who makes and relies on a search made at the Land Registry maintained by the 1st defendant. If this confidence is jeopardized that could have dire consequences for trade and economic activity in this country.* F

[27] By analogy I refer to the decision of the Court of Appeal in *Pendaftar dan Pemeriksa Kereta-Kereta Motor, Melaka & Ors v. KS South Motor Sdn Bhd* [2000] 2 CLJ 573, the issues in this case involving the duty of the RIMV to keep a register of vehicles which was proper and accurate. The Court of Appeal held in a leading judgment of Siti Norma Yaakob JCA as she then was and I quote: G

[1] The appellants' argument that there is no duty on them to keep a true a proper register of vehicles registered by them is only tenable if such duty of care is owed to the public at large. This is not the criteria here. The duty to take care sought to be imposed here is owed to an aggrieved party and not to the public at large. H

2(b) It also indicates that the day-today-operations at the registries of the first and second appellants have not been conducted properly or professionally. For that, the first and the second appellants must be made accountable.

I

A [3] The law should be that the registries maintained by the appellants must contain accurate particulars of all vehicles registered by them. This is essential for the good working of the register system as owners of motor vehicles or anybody else involved in the motor trade conduct searches on the registers on payment of a fee, and clearly, a duty to take care must exist in such a case.

B [4] It follows that, every particular information recorded in the files of a registered vehicle is a representation that such information is accurate and reliable as the paying public, particularly owners of motor vehicles, would-be purchasers of such vehicles and those involved in the motor trade like the respondent, rely on such C information to conduct private and commercial transactions. It is this concept of general reliance that imposes a duty on the first and second appellants to take care that all information coming from them are accurate.

[5] It is incorrect for the appellants to maintain that the second D appellant was not aware of the purpose of the respondent's visit to the registry, as the act of endorsing the registration book is proof enough that a transfer transaction was afoot. That aside, the second appellant ought to have been aware that the act of transferring the car to the respondent's name may not be the last transaction conducted by the respondent on the car. The possibility of it being E transferred by the respondent to a third party by way of a resale is there and, being a car trader, that possibility is real. The incidence of negligence or negligent statement and misrepresentation, in the circumstances, has been proved.

[28] *I would hold that the aforesaid principles apply to the 1st defendant in our* F *case and I would hold that the 1st defendant owed a duty of care to the 5th & 6th defendants to ensure that when searches are made at the land registry, they would be acting on accurate information and a properly maintained and accurate register of titles* ... (emphasis added)

[51] The provisions on searches are found in ss. 384 to 386 of the National Land Code 1965 which provide: G

384. Private searches

Any person or body may, at any time during normal office hours of any Registry or Land Office, but subject to payment of the prescribed fee and such other conditions (if any) as may be prescribed, inspect and take notes H of or extracts from -

(a) any register of title, Presentation Book or Correction Notebook maintained by the Registrar or any predecessor in office; and

(b) any instrument of dealing or application presented or made to, or in the custody of, the Registrar. I

385. Official Searches

(1) Any person or body may apply to the Registrar for an official search in respect of any land.

(2) Any such application shall be accompanied by the prescribed fee, and the Registrar shall, as soon as may be after the receipt thereof, issue to the applicant a certificate of search under his hand and seal -

(a) specifying the person or body for the time being registered as proprietor of the land and, if he is registered as such as trustee or as representative, indicating that face;

(b) summarising, so far as they relate to matters which are still effective, all memorials and other entries on the register document of title thereto;

(ba) specifying the express conditions and restrictions in interest to which the land is subject;

(c) indicating whether, at the time of issue of the certificate (which shall be precisely stated therein) -

(i) any instrument of dealing has been presented for registration on the register document of title to the land;

(ii) any application for the endorsement or entry of any matter on that document has been made under Chapter 7 of Part Eighteen, Chapter 1 of Part Nineteen, Chapter 2 of Part Twenty-one or Part Twenty-two; and

(iii) a copy of any prohibitory or other order relating to the land or any share or interest therein has been presented to or served on the Registrar pursuant to the provisions of this Act or any other written law for the time being in force.

386. Compensation

Any purchaser of any alienated land, or any share or interest therein, who suffers any loss or damage by reason of any error in, or omission from, any certificate of search shall be entitled to such compensation as may be agreed or determined in accordance with the provisions of section 434.

[52] It can therefore be discerned that there are two types of searches provided in the National Land Code and there are conflicting High Court cases on the interpretation of the consequences thereto.

[53] In *Poh Yang Hong v. Ng Lai Yin & Ors* [2010] 8 CLJ 323, Lee Swee Seng JC (now J) held as follows at pp. 330-331 pursuant to an O. 14A application:

[16] *Effect must be given to s. 386 of the NLC for no provision of any piece of legislation is there for decorative purpose but they are there, designed for dealing with the decadence of fallen humanity and deficiencies in humanly created system that may lead to another member of the public suffering as a result. Section 386 of the NLC reads:*

Any purchaser of any alienated land, or any share or interest therein, who suffers any loss or damage by reason of any error in, omission from, any certificate of search shall be entitled to such compensation as may be agreed or determined in accordance with the provisions of section 434.

[17] *The bug stops here is an adage we do well to abide by, otherwise public servants will never be accountable for the misdeeds of those under them. In a UK Court of Appeal case of the Ministry of Housing and Local Government v. Sharp and Another [1970] 2 QB 223, a careless clerk in a local land registry issued, on request, an official certificate to would-be purchaser of a piece of land that the land was free from any charge when in fact the Ministry of Housing and Local Government had already registered a charge two years earlier. The purchasers completed the sale, based on the certificate. As the Ministry could not claim the benefit of the charge from the purchasers, they sued the registrar of the land registry and the local council on the ground that they were responsible for the mistake of the clerk.*

[18] The Court of Appeal at p. 265 of the report states clearly and cogently as follows:

> The fundamental obligation of the registrar is to keep the register, and in return he receives the prescribed fees. He must enter in the register every charge which is duly submitted to him. He must allow any person to search the register: and if asked, he must make an official search and issue an official certificate setting forth the result.
>
> The object of the register is to provide security for two classes of people, encumbrancers and purchasers.
>
> By requiring a search, a purchaser is entitled to know exactly that charges encumber the land, and to adjust his price accordingly. If the registrar issues an official certificate, showing the land to be clear of any charge, that is conclusive in favour of the purchaser.

[19] It is interesting that the Malay word for 'responsibility' is 'tanggungjawab' which carries with it the meaning of 'bearing the burden of answering and accounting'. The public has a reasonable expectation that public servants will do and be just that as are those in private sector.

[20] The Court of Appeal at p. 226 went on to reason on the rationale and recount the rudiments of being responsible for one's actions:

> He must answer for the mistakes of the clerk and make for the loss. He is a public servant and comes within the settled principle of English Law that when an official duty is laid on a public officer, by statute or common law, then he is personally responsible for seeing that the duty is carried out. He more and often does get a clerk or a minor official to do the duty for him, but if so, he is answerable for the transgression of the subordinate. Sometimes it is an absolute duty, in which case he must see that it is performed absolutely. At other times it is only a duty to use due diligence in which case he must see that due diligence is used. But, in any event, if the duty is broken, and injury done thereby to one of the public, then the public officer is answerable. The injured person can sue him in the civil courts for compensation … By law he is responsible. He will, of course, if he is wise, insure himself against his liability: or get the Government to stand by him. But liable he is to the person injured. (emphasis added)

[54] Subsequently in the same case after trial reported as *Poh Yang Hong v. Ng Lai Yin & Ors* [2013] 8 CLJ 964, Su Geok Yam J held as follows at pp. 995-996 with emphasis added:

> [88] The court was left with the clear impression that in both types of searches which can only be requisitioned upon the payment of the prescribed fee, the record to which the officer concerned would have access was the second defendant's data base in his computerised land search system. Hence, it would not have made any difference in the instant case whether the search which was made on 18 September 2007 by the plaintiff's solicitors was a private search under s. 384 of the NLC 1965 or an official search under s. 385 of the NLC 1965 as the result would have been the same.
>
> [89] *This view of the court is fortified by the results of the official search carried out on 4 June 2008 on title GRN 232, Lot 349, as the results were similar to the results of the private search carried out on 18 September 2007 as both searches disclosed the registered proprietor of the land to be the Vendor.*
>
> [90] *Apart from that, there is nothing in s. 386 of the NLC 1965 which expressly excludes the liability of the second defendant in his official capacity in cases where the person who has requisitioned a private search has acted to his detriment in relying on the result of the search carried out by the officer or staff of the second defendant*. The section merely provides that any purchaser of any alienated land, or any share or interest therein, who suffers any loss or damage or damage by reason of any error in, or omission from, any certificate of search shall be entitled to such compensation as may be agreed or determined in accordance with the provisions of s. 434.
>
> [91] In the absence of such a statutory exclusion clause, and since the NLC 1965 embodies the Torrens system of registration of land the second defendant must be held liable to the plaintiff for the losses suffered by the plaintiff flowing from the breach of the second defendant's duty of care to the plaintiff in the discharge and performance of the statutory duty which is imposed on the second defendant by the NLC 1965 to maintain a register of all lands caused to be registered at the Land Registry, Wilayah Persekutuan, Kuala Lumpur.
>
> [92] Hence, I was of the respectful view that the decision of the *Malaysian Court of Appeal in Pendaftar Dan Pemeriksa Kereta-Kereta Motor Melaka & Ors v. KS South Motor Sdn Bhd supra*, could apply to the facts of the instant case although the law concerned was different because both sets of laws require the maintenance of a register by the authority concerned from which members of the public can obtain the requisite information to enable them to make an informed decision whether to make or continue a purchase. In the instant case, the decision relates to the purchase of land. In the above case, the decision relates to the purchase of a motor vehicle.

[55] However in *Tirai Kristal Sdn Bhd lwn. Pengarah Tanah Dan Galian Wilayah Persekutuan Kuala Lumpur* [2013] 6 CLJ 530, Siti Khadijah S Hassan JC held as follows at p. 539:

> [18] Peruntukan ss. 384, 385 dan 386 wujud secara bersiri masing-masing mempunyai maksud tersendiri yang jelas bagi setiap satunya dan dapat dibezakan antara satu dengan yang lainnya. Adalah jelas s. 385 KTN merupakan proviso spesifik yang meletakkan kewajipan untuk defendan berhati-hati apabila memberi maklumat kepada pihak yang mendapatkan maklumat daripada defendan di bawah seksyen ini. Perlanggaran kepada kewajipan ini memberi hak kepada pihak yang mendapat maklumat di bawah s. 385 KTN untuk mendapat pampasan di bawah s. 386 KTN.
>
> [19] *Perbezaan di antara s. 385 dengan s. 384 adalah walaupun s. 384 KTN menyediakan keadaan yang menggalakkan ketelusan dan disediakan untuk kemudahan awam seksyen ini tidak mengandungi sebarang pengesahan bagi maklumat yang dikemukakan dalam bentuk ekstrak daripada pangkalan data di PTG. Di bawah seksyen ini kewajipan untuk berhati-hati terletak pada plaintif. Tanggungjawab atas kerugian terletak pada PTG berkaitan s. 385 KTN dan bukan di bawah s. 384 KTN*. Dengan itu terpulang pada orang awam seksyen mana yang dipilih apabila mendapat maklumat daripada PTG.
>
> [20] Sehubungan dengan itu pada pandangan mahkamah di bawah s. 384 KTN berhubungan dengan catatan carian persendirian kewajipan untuk berhati-hati terletak pada plaintif dan defendan tidak dipikulkan dengan tanggungjawab atas kerugian yang dialami oleh plaintif. (emphasis added)

[56] The aforesaid cases are not binding on me. From my close reading of the statute particularly the provision on compensation, the responsibility and liability assumed by the land registry are different in respect of the type of searches. It is made clear that compensation is only attracted for loss or damage by reason of any error in or omission from the certificate of search that emanated from an official search. Thus by necessary implication, there would be no compensation payable for any loss or damage suffered in reliance on the results of a private search.

This is by virtue of the application of the maxim of construction, *expression unius est exclusion alterius*, meaning the express mention of one matter implies the exclusion of matters which have not been mentioned; see *JHW Reels Sdn Bhd v. Syarikat Borcos Shipping Sdn Bhd* [2013] 7 CLJ 249 and *Jamaluddin Mohd Radzi & Ors v. Sivakumar Varatharaju Naidu; Suruhanjaya Pilihan Raya (Intervener)* [2009] 4 CLJ 347.

The rationale appears to be that the private search is meant for general information only. For purposes of the conduct and undertaking of land dealings, the official search has to be done. In this regard the search results would be set out in a certificate of search issued under the hand and seal of the registrar. Otherwise, the parties rely on the results of the private search at their own peril.

[57] From the evidence adduced, the searches done by the plaintiff were only private searches. Although the plaintiff had in such instances received the results in the form of a written printout from the sixth defendant rather than the plaintiff having to copy them manually from the register, these printouts *ipso facto* did not in my view convert them into certificates of search arising from official searches. I observed that the search results that were tendered in court were clearly stipulated to have been made pursuant to s. 384 of the National Land Code. The signature and seal of the registrar were markedly absent therein.

[58] In the premises *albeit* the search results were incomplete and hence misleading as admitted by DW5, it is plain that the policy of the statute negatived any duty of care that might be owed by the land registry in relation to private searches. This is the risk voluntarily assumed by the plaintiff for having conducted private searches instead of official searches. Accordingly, the plaintiff could not mount or sustain its action in negligence against the sixth defendant and I so find and hold.

[59] It follows that it is unnecessary for me to consider here whether the claim in damages has been properly or sufficiently pleaded and that the nature of the claim made by the plaintiff being the recovery of its purchase price was an action *in personam* that ought to be pursued against contracting parties, to wit the first defendant instead of the land registry following the cases of *Perwira Affin Bank Bhd v. Sardar Mohd Roshan Khan* [2011] 5 CLJ 886 and *Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors (No 2)* [2001] 5 CLJ 8 as submitted by the sixth defendant. Likewise, it is also unnecessary to deal with the procedural defect raised by sixth defendant for non or misjoinder of parties by reason of ss. 5 and 6 of the Government Proceedings Act 1956 and Court of Appeal case of *Government of the State of Sabah v. Syarikat Raspand* [2010] 7 CLJ 945 as well as other related cases relied by the sixth defendant.

Conclusion

[60] For the foregoing reasons, I dismiss the plaintiff's claim against the sixth defendant with costs of RM20,000. I also dismiss the third defendant's counterclaim against the plaintiff. Since the plaintiff has not earlier withdrawn but only decided after trial not to pursue its claim against the third defendant, I order that the third defendant and the plaintiff to each bear its own costs in view that their claim against each other were either not pursued or successful. However *vis-a-vis* the plaintiff and the fourth defendant, I order that the plaintiff pays the fourth defendant costs of RM35,000.